APPENDIX A.

Proposed Decision.

State of California, Department of Alcoholic Beverage Control.

In the Matter of the Accusation against Probro, Inc. Lakewood Club, 17436-38 So. Lakewood Blvd., Bellflower. Respondent and Licensee under the Alcoholic Beverage Control Act.

File 38416

Reg. 2586

Licenses: 40-38416

Time of Hearing: 2-21-67 9:00 a.m.

Place of Hearing: 314 W. First St., L. A.

Reporter: Louise Lillico OLA 14325

Appearances: For Dept: Richard K. Quan, Deputy Attorney General. For Resp: Samuel Goldfarb, Esq. 15720 Ventura Boulevard, Encino, California.

FINDINGS OF FACT:

COUNT I

The demurrer to the Accusation was overruled on each of the points raised and it was then stipulated that the facts alleged are true and I accordingly find it to be true that within one year last past and immediately preceding the date of this accusation, respondent licensee, directly and by and through its agents, employees, and servants, permitted and suffered the above-designated licensed premises to be used in a manner more particularly described below, which did create a condition then and there contrary to public welfare and morals in violation of Article XX, Section 22 of the

California State Constitution and Section 24200(a) of the Business and Professions Code:

1. On or about May 27, 1966, respondent licensees, at and in the above-designated licensed premises, did employ and use the services of a female, Reagan Wilson, and did permit and suffer the said female to tend bar and wait on patrons while attired in bikini shorts with her breasts fully exposed.

2. On or about May 28, 1966, respondent licensee, at and in the above-designated licensed premises, did employ and use the services of a female, Joan Rae Allen, and did permit and suffer the said female to tend bar and wait on patrons while attired in panty shorts with her breasts fully exposed.

3. On or about June 21, 1966, respondent licensee, at and in the above-designated licensed premises, did employ and use the services of a female, Judithann Hudson aka Reidman, and did permit and suffer the said female to tend bar and wait on patrons while attired in bikini pants with her breasts fully exposed.

4. On or about July 29, 1966, respondent licensee, at and in the above-designated licensed premises, did employ and use the services of a female, Sharon Lee Huff, and did permit and suffer the said female to tend bar and wait on patrons while attired in capri pants with her breasts fully exposed.

5. On or about October 26, 1966, respondent licensee, at and in the above-designated licensed premises, did employ and use the services of two females, Joanne Mary Turcotte and Margaret Theodosia Dosa, and did permit and suffer the said females to tend bar and wait on patrons while attired in bikini pants with their breasts fully exposed.

6. For purposes of considering the imposition of penalty against the respondent, if any, it is further found that the above named respondent has permitted certain female employees to tend bar and wait on patrons while attired in brief bikini-type panties with their breasts fully exposed at the above described premises, commencing on or about March 21, 1966 and continuing thereafter up to the date of this accusation, including, but not limited to, the dates hereinabove mentioned in paragraphs 1, 2, 3, 4 and 5. Said conduct continued notwithstanding the filing of an accusation against said respondent on or about May 6, 1966 entitled "In the Matter of the Accusation Against Probro, Inc. dba Lakewood Club," File No. 38416, Reg. No. 9344, alleging a violation of Article XX, Section 22 of the California Constitution and Section 24200(a) of the Business and Professions Code for permitting said conduct to occur on said licensed premises on four specified dates, to wit, on March 21, 1966, March 22, 1966, March 25, 1966 and April 23, 1966.

* * * * *

Despite the allegation in sub-count 6 of Count I for the purpose only of considering any penalty to be imposed and the stipulation that the facts therein set forth are true, said facts are not being considered in the penalty recommended below because the decision on the prior accusation referred to is still not final.

FINDINGS AS TO PREVIOUS RECORD:

Licensed since December 16, 1965. Under Reg. 9344 and following a decision under Government Code Section 11517(c), the license was suspended for 45 days with 15 days stayed operative on December 15, 1966 but it was stayed pending appeal.

DETERMINATION OF ISSUES PRESENTED:

Count I: Grounds for the suspension or revocation of respondent's license under Section 24200(a) of the Alcoholic Beverage Control Act and within the meaning of Article XX, Section 22 of the California Constitution were established.

PENALTY: The license is suspended for 30 days.

Dated at Los Angeles, California, March 14, 1967.

/s/ George K. Bellows
George K. Bellows, Hearing Officer
Office of Administrative Procedure

APPENDIX B.

Certificate of Decision.

State of California, Department of Alcoholic Beverage Control.

File 38416

Reg. 2586

It is hereby certified that a Hearing Officer of the Office of Administrative Procedure having submitted the attached proposed decision, and the Department of Alcoholic Beverage Control, having reviewed the findings of fact, determination of issues and recommended penalty, adopted said proposed decision as its decision in the case therein described on April 20, 1967.

A representative of the Department will call on you on or after June 8, 1967 to pick up the license certificate.

Sacramento, California

Dated: April 20, 1967

/s/ Dorothy Pierson
Hearing and Legal Unit

ABC-132A (1-67)

RIGHT OF APPEAL

The attached document is the decision of the Department of Alcoholic Beverage Control in the matter described. As a party to the action, you have a right to appeal under the law. Appeals must be filed with the Alcoholic Beverage Control Appeals Board, P.O. Box

1139, Sacramento, California 95805. The Appeals Board is an agency independent of the Department.

Requirements for filing appeals are set forth in Sections 23080-23087, Business and Professions Code (also known as Alcoholic Beverage Control Act), and Chapter 1.1, Title 4, Business Regulations, California Administrative Code. These requirements must be met.

Further information may be had by writing to the Alcoholic Beverage Control Appeals Board at the above address.

APPENDIX C.

Opinion of the Alcoholic Beverage Control Appeals Board.

Served on all parties by certified mail. Date Nov. 2, 1967.

Before the Alcoholic Beverage Control Appeals Board of the State of California.

In the Matter of the Accusation against Probro, Inc. Lakewood Club, 17436-38 South Lakewood Blvd., Bellflower, Respondent and Licensee, under the Alcoholic Beverage Control Act. AB-2840.

File No. 38416; Reg. No. 2586.

Time & Place of Hearing; July 26, 1967, at 10 a.m. 1525 South Broadway, Los Angeles, California.

For Department: Honorable Thomas Lynch, Attorney General, John M. Huntington, Deputy Attorney General.

For Appellant: Bernard Minkow, Esq.

In a decision adopted by the department on April 20, 1967, it was determined that grounds for suspension or revocation of appellant's license under the provisions of section 24200(a) of the Alcoholic Beverage Control Act and article XX, section 22 of the Constitution existed based upon findings that appellant utilized the services of female employees to serve alcoholic beverages to patrons while clad in costumes leaving their breasts exposed. The department imposed a penalty of suspension of the license privilege for a period of 30 days.

Appellant stipulated to the truth of the allegations of the accusation at the hearing before the department.

Therefore, the question of the sufficiency of the evidence to support the findings is not presented. Rather, appellant raises the following specific questions to be considered:

"1. Whether or not the acts complained of are, in and of themselves, acts contrary to public welfare and morals;

"2. Whether or not Article XX, Section 22 of the California Constitution and Section 24200(a) of the California Business and Professions Code are unconstitutionally vague;

"3. Whether or not the acts of the Department are those of a censor;

"4. Whether or not the Department has abused its discretion in bringing these accusations against Respondent; and

"5. Whether or not the action of the Department is violative of the First Amendment to the United States Constitution."

The department's decision contains the following findings of fact:

"COUNT I

"The demurrer to the Accusation was overruled on each of the points raised and it was then stipulated that the facts alleged are true and I accordingly find it to be true that within one year last past and immediately preceding the date of this accusation, respondent licensee, directly and by and through its agents, employees, and servants, permitted and suffered the above-designated licensed premises to be used in a manner more particularly described below, which did create a condition then

and there contrary to public welfare and morals in violation of Article XX, Section 22 of the California State Constitution and Section 24200(a) of the Business and Professions Code:

"1. On or about May 27, 1966, respondent licensee, at and in the above-designated licensed premises, did employ and use the services of a female, Reagan Wilson, and did permit and suffer the said female to tend bar and wait on patrons while attired in bikini shorts with her breasts fully exposed.

"2. On or about May 28, 1966, respondent licensee, at and in the above-designated licensed premises, did employ and use the services of a female, Joan Rae Allen, and did permit and suffer the said female to tend bar and wait on patrons while attired in panty shorts with her breasts fully exposed.

"3. On or about June 21, 1966, respondent licensee, at and in the above-designated licensed premises, did employ and use the services of a female, Judithann Hudson aka Reidman, and did permit and suffer the said female to tend bar and wait on patrons while attired in bikini pants with her breasts fully exposed.

"4. On or about July 29, 1966, respondent licensee, at and in the above-designated licensed premises, did employ and use the services of a female, Sharon Lee Huff, and did permit and suffer the said female to tend bar and wait on patrons while attired in capri pants with her breasts fully exposed.

"5. On or about October 26, 1966, respondent licensee, at and in the above designated licensed premises, did employ and use the services of two females, Joanne Mary Turcotte and Margaret Theodosia Dosa, and did permit and suffer the said females to tend bar and wait on patrons while attired in bikini pants with their breasts fully exposed.

"6. For purposes of considering the imposition of penalty against the respondent, if any, it is further found that the above named respondent has permitted certain female employees to tend bar and wait on patrons while attired in brief bikini-type panties with their breasts fully exposed at the above described premises, commencing on or about March 21, 1966 and continuing thereafter up to the date of this accusation, including, but not limited to, the dates hereinabove mentioned in paragraphs 1, 2, 3, 4 and 5. Said conduct continued notwithstanding the filing of an accusation against said respondent on or about May 6, 1966 entitled 'In the Matter of the Accusation Against Probro, Inc. dba Lakewood Club,' File No. 38416, Reg. No. 9344, alleging a violation of Article XX, Section 22 of the California Constitution and Section 24200(a) of the Business and Professions Code for permitting said conduct to occur on said licensed premises on four specified dates, to wit, on March 21, 1966, March 22, 1966, March 25, 1966 and April 23, 1966.

* * * * *

"Despite the allegation in sub-count 6 of Count I for the purpose only of considering any penalty to

be imposed and the stipulation that the facts therein set forth are true, said facts are not being considered in the penalty recommended below because the decision on the prior accusation referred to is still not final."

We consider first appellant's contention that the department's decision is "violative of the Constitution of the United States" under the First Amendment protection of freedom of expression. We considered this argument in the matter of the appeal of Boreta Enterprises, Inc., AB-2519, and stated as follows:

"3. *The guarantees of freedom of speech and expression in the Federal and State Constitutions do not limit the authority of the Director to suspend or revoke the license to sell alcoholic beverages if the licensee persists in selling alcoholic beverages by employing waitresses who serve such alcoholic beverages with bared breasts.*

"We have carefully considered the authorities cited by appellant. We have no argument with the rules of law cited therein as to the importance of free speech and free expression. While this matter has been under consideration we have studied the recent U. S. Supreme Court decisions in *A Book, etc. v. Atty. Gen. of Commonwealth of Massachusetts,* 86 S. Ct. 975 (1966); *Ginzburg v. U. S.,* 86 S. Ct. 942 (1966); and *Mishkin v. State of New York,* 86 S. Ct. 958 (1966); If anything, these decisions reinforce our conviction that the issue of free expression is not pertinent on the facts presented to us.

"The facts are uncontradicted. The licensee's employees were waitresses who took orders and served

alcoholic beverages to customers and, in the course of such employment, 'did display and expose their breasts to patrons and persons assembled' at the premises. Photographs of one of the waitress-employees were distributed to patrons of licensee according to ticket number. Clearly, the commercial aspect of the enterprise was the paramount consideration here. The women were employed as and acted as waitresses. It is the regulation of the attire and conduct of the waitresses to which the attention of the department was directed. The issue before us at this point is whether the department was constitutionally engaged in the regulation of commercial activity.

"We are mindful of the fact that free speech is protectible even where it is published in a paid advertisement. (*New York Times v. Sullivan,* 376 U.S. 254, at 266 (1964).) But there the content of the expression was not related to a commercial activity. Where, on the other hand, commercial activity is involved, the Constitution affords no like protection of freedom of expression respecting commercial advertising. (*Valentine v. Chrestensen,* 316 U.S. 52, 54 (1941); *Murdock v. Pennsylvania,* 319 U.S. 105, 108 (1942). *Mishkin* and *Ginsburg,* supra, deal in some detail with the significance of commercial activity in determining the scope of obscenity. The facts here are, of course, substantially different. But the commercial nature of the waitresses' actions and attire is a fact important to this constitutional issue which appellant's argument does not overcome and which renders its authority inapplicable here.

"We have also considered *Weaver v. Jordan,* 64 A.C. 243, 49 Cal. Rptr. 537 (1966), to determine if this re-

cent pronouncement of our California Supreme Court casts any light on this problem. But that case turns on the absolute prohibition of a form of communication. Like *New York Times v. Sullivan, supra,* the commercial aspects of the communication were incidental to the absolute prohibition of the form of communication. The court in *Weaver* noted with approval the distinction pertinent here, that:

> " 'The dissemination of protected expression under commercial auspices is of course to be distinguished from the dissemination of "purely commercial" communications such as mercantile advertising—which do not enjoy the First Amendment protection otherwise accorded. (See *Murdock v. Pennsylvania, supra* (1943) 319 U.S. 105, 110-111; *Valentine v. Chrestensen* (1942) 316 U.S. 52, 55 (62 S.Ct. 920, 86 L.Ed. 1262); *New York Times Co. v. Sullivan, supra,* (1964), 376 U.S. 254, 266.)'
> (*Weaver v. Jordan, supra,* at page 255 (fn. 11).)

"Thus we return to the authority vested in the department to regulate the highly sensitive alcoholic beverage industry. Constitutionally this is delegated to the states by the Twenty-First Amendment to the United States Constitution and by the California Constitution to the Legislature and the department. Regulation is a proper exercise of the police power of the state. Where, as here, the regulation is accomplished by procedure affording due process of law, there is no error. The recent U.S. Supreme Court cases of *Seagram v. Hostetter, supra,* 86 S.Ct. ..... (1966), 34 U.S. Law Week 4355, supports this position."

Appellant's next contention is that the provisions of article XX, section 22 of the Constitution and section 24200(a), Alcoholic Beverage Control Act, are so indefinite and uncertain that the bringing of an action by the department under said provisions constitutes an abuse of discretion. In the recent case of Caskey, AB-2620, we considered this question as follows:

". . . Appellant makes the argument that the constitutional provision granting the department the right to suspend or revoke a license upon the determination that 'continuance of such license would be contrary to public welfare or morals' is unconstitutionally vague and uncertain. Our attention has been directed to no case in which the validity of article XX, section 22 on this point has been presented. The authority of the department to proceed directly under this constitutional provision without alleging the violation of any specific statute or rule has been recognized. Thus in *Mack v. Dept. of Alcoholic Bev. Control,* 178 Cal. App.2d 149, 2 Cal. Rptr. 629, relating to bookmaking activities on the licensed premises by the bartender, the department proceeded directly under the provisions of section 24200(a) (public welfare and morals). The same was true in the cases of *Quilici v. Dept. of Alcoholic Bev. Control,* 178 Cal. App.2d 549, 3 Cal. Rptr. 49; *Munro v. Alcoholic Bev. Control Appeals Bd. & Weiss,* 181 Cal. App.2d 162, 5 Cal. Rptr. 527; and *Harris v. Alcoholic Bev. Control Appeals Bd. & Roundhouse,* 197 Cal. App.2d 172, 17 Cal. Rptr. 315. While in each of these cases there was a penal statute prohibiting the conduct involved, this distinction may not be as substantial as it first appears for the misconduct did not relate to the sale of alcoholic beverages and there is

nothing in the Constitution, the Alcoholic Beverage Control Act, or the department rules that informs a licensee that he may be held responsible for the unlawful conduct of his employee in the absence of an allegation and a finding, supported by the evidence, that the licensee permitted said unlawful conduct.

"The case of *Vallerga v. Depart of Alcoholic Bev. Control,* 53 Cal.2d 313, 1 Cal. Rptr. 494, deals with this question to some extent. There the department had proceeded against the licensee under the provisions of section 24200(e) of the Alcoholic Beverage Control Act forbidding a licensee to permit his premises to become a ' "resort" for . . . prostitutes, pimps, panderers or sexual perverts.' The Supreme Court held this statute to be unconstitutional as violative of the 'good cause' requirement of article XX, section 22. In the course of its opinion, the court stated:

> " 'The foregoing is sufficient evidence of a display of sexual desires and urges which, when made in a public place as a continuing course of conduct, could reasonably be found by the trier of fact to be "contrary to public welfare and morals." It is apparent in the present case, however, that the foregoing evidence was not relied upon by the finder of fact in arriving at the conclusion that continuance of the license would be contrary to public welfare or morals. . . .'
>
> * * *
>
> " 'Section 22, article XX of our Constitution vests the Department of Alcholic Beverage Control with authority to institute disciplinary proceedings against a licensee and to revoke his license upon determination "for good cause" that the con-

tinuance of such license would be "contrary to public welfare or morals." Nothing we have herein stated is to be construed as infringing upon such authority. . . .'

"In the recent United States Supreme Court case of *Seagram v. Hostetter,* 86 S.Ct. 1254, an attack was made upon the 'minimum price' provisions of the New York liquor control law upon the ground, among others, that the statutory definition of 'related person' was unconstitutionally vague. In dealing with this question, the court, in quoting from an earlier case, stated in part:

> "'". . . we think it plain under our decisions that if substantiality is the statutory guide, the limits of administrative action are sufficiently definite or ascertainable so as to survive challenge on the grounds of unconstitutionality." . . .'
>
> (See also *Securities Comm. v. Chenery Corp.,* 332 U.S. 194.)

"The primary goal of the department in bringing disciplinary action against its licensees is to keep the regulated industry clean and wholesome. Where this is done by the application of a standard which is easily ascertainable and clearly understood by the industry, it is our opinion that the department has acted within its constitutional authority."

Based upon the foregoing, we find no merit in appellant's appeal. Conditions under which alcoholic beverages may be dispensed are subject to state control. In this type of a disciplinary proceeding the department

acts only after affording the licensee an opportunity for a full hearing. Such procedure affords due process of law.

In our opinion, the findings are supported by substantial evidence and the findings support the department's decision. The decision of the department is affirmed.

Donald R. Wagner, Chairman
Alcoholic Beverage Control
Appeals Board

We Concurr: Robert I. Tuttle, Adrienne Sausset, Sacramento, California, October 24, 1967.

APPENDIX D.

Decision of the Court of Appeal.

Los Angeles, Cal. Jan. 2, 1968

Title, Probro, Inc, etc. Superior Court of LA No. 32520.

THE COURT:

Petition for Writ of Mandate Denied.

Clay Robbins, Clerk

APPENDIX E.

Decision of the California Supreme Court.

Clerk's Office, Supreme Court, 4250 State Building, San Francisco, California 94102, Jan. 31, 1968.

Dear Sir: I have this day filed Order

Hearing Denied

In re: 2 Civ. No. 32520, Probro, dba Lakewood Club vs. Dept. of A.B.C.

Respectfully,

William I. Sullivan
Clerk

APPENDIX F.

Decision of the Court of Appeal.

Los Angeles, Cal. Feb. 26, 1968

Title, Probro, Inc. vs. Dept of ABC, etc. No. 32520.

THE COURT:

Petition for order staying administrative decision denied.

Clay Robbins, Clerk

APPENDIX G.

Order.

Supreme Court of the United States, No. ....., October Term, 1967.

Probro, Inc., d/b/a Lakewood Club, Petitioner, vs. The Department of Alcoholic Beverage Control of the State of California.

Upon Consideration of the application of counsel for the petitioner and of the opposition of the State of California thereto,

It Is Ordered that the administrative order of the Department of Alcoholic Beverage Control of the State of California, suspending the permit of the petitioner for a period of thirty (30) days after February 29, 1968, be, and the same is hereby, stayed pending the timely filing of a petition for a writ of certiorari in the above-captioned cause. Should such a petition be so timely filed, this stay is to continue pending this Court's action on the petition. In the event the petition for a writ of certiorari is denied, this stay is to terminate automatically. Should the petition for a writ of certiorari be granted, this stay is to remain in effect pending the issuance of the mandate of this Court.

/s/ W. O. Douglas
Associate Justice of the Supreme
Court of the United States.

Dated this 5th day of March, 1968.

APPENDIX H.

Findings of Fact and Conclusions of Law.

Superior Court of the State of California, for the County of Los Angeles.

Probro, Inc., d/b/a Lakewood Club, Petitioner, vs. The Department of Alcoholic Beverage Control of the State of California, Respondent. No. 920 751.

Filed Mar. 11, 1968.

This Matter Came Regularly before this Court on February 5, 1968 for hearing. Samuel Goldfarb appeared as attorney for Petitioner and Kenneth Scholtz, Deputy Attorney General of the State of California, appeared as attorney for Respondent. The record of administrative proceedings having been received into evidence and examined by the Court, no additional evidence having been received by the Court, arguments having been presented, and the matter having been submitted for decision, the Court makes the following:

FINDING OF FACTS

1. That portion of Respondent's finding which finds that the employment of "topless" waitresses is contrary to public welfare and morals is not supported by substantial evidence in light of the whole record.

From these facts the Court makes the following:

CONCLUSIONS OF LAW

1. Respondent committed a prejudicial abuse of discretion, within the meaning of California Code of Civil

Procedure, Section 1094.5(b), in that Respondent's findings are not supported by the evidence as found in this Cort's Findings of Fact No. 1.

2. This matter is remanded to Respondent for additional hearing and the taking of evidence on whether the employment of "topless" waitresses is contrary to public welfare and morals. See In re Davis, 242 CA 2d 645, 667 (1966).

Let Judgment Be Entered Accordingly.

Dated Mar. 11, 1968.

/s/ Robert S. Thompson
Judge

APPENDIX I.

Judgment.

Filed Mar. 11, 1968.

Superior Court of the State of California, for the County of Los Angeles.

Probro, Inc., d/b/a Lakewood Club, Petitioner, vs. The Department of Alcoholic Beverage Control of the State of California, Respondent. No. 920 751.

This Matter Came Regularly before this Court on February 5, 1968 for hearing. Samuel Goldfarb appeared as attorney for Petitioner, and Kenneth Scholtz, Deputy Attorney General of the State of California, appeared as attorney for Respondent. The record of the administrative proceedings having been received into evidence and examined by the Court, no additional evidence having been received by the Court, arguments having been presented and the Court having made Findings of Facts and Conclusions of Law which have been signed and filed.

It Is Ordered That:

1. This matter be remanded to Respondent for additional hearing on the issue of whether or not the employment of topless waitresses is contrary to public welfare and morals.

Dated: Mar. 11, 1968

(Seal)

Robert S. Thompson